NO. 33871

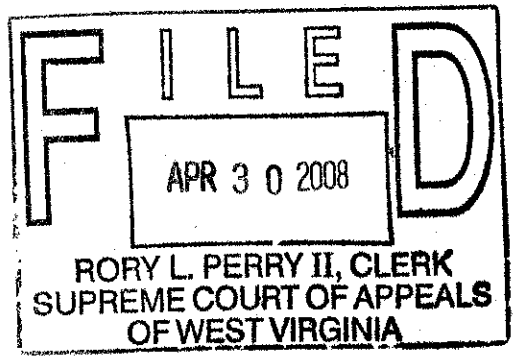
STATE OF WEST VIRGINIA ex rel.
PROSECUTING ATTORNEY OF KANAWHA
COUNTY, WEST VIRGINIA,

Petitioner Below,
Appellee Here,

v.

BAYER CORPORATION,

Respondent Below,
Appellant Here



APPELLEE'S BRIEF ON APPEAL

STEPHEN B. REVERCOMB,
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NATURE OF PROCEEDINGS AND RULINGS BELOW

This is a case arising from the reversal of the circuit court of a county commission's grant of an application for relief from erroneous assessment.

Appellant Bayer Corporation filed industrial personal property listings with the West Virginia State Tax Department for Tax Years 2001, 2002, and 2003. Appellant then filed an application for relief from erroneous assessment before the Kanawha County Commission on or about August 31, 2003.

The Kanawha County Commission held hearings on the appellant's application for relief from erroneous assessment on November 6 and November 20, 2003. The Commission, by a two-to-one vote, granted the appellant's applications.

The Prosecuting Attorney of Kanawha County appealed the grant in a timely manner within thirty days of the entry of the Commission's Order. The Circuit Court of Kanawha County reversed the decision of the Kanawha County Commission.

Appellant has appealed that decision to this Court. The Prosecuting Attorney cross-appeals regarding the issue of the burden of proof a taxpayer must meet when proceeding before a county commission on an application for relief from erroneous assessment.

STATEMENT OF FACT

Appellant Bayer Corporation ("Appellant") is a multi-national corporation which owns taxable industrial personal property in Kanawha County, West Virginia. One of the divisions of the appellant's firm is the state tax group, headed by CPA Gary Dzura. Commission Hearing Tr. at p.96-97. The state tax group consists of seven people. Appellant has fifty years of familiarity with West Virginia tax law. Commission Hearing Tr. at p. 138.

Appellant acquired chemical plants in Kanawha County in 2000 from a firm named Lyondell. Commission Hearing Tr. at p.99. Prior to that time, appellant owned no property in Kanawha County. Appellant filed industrial personal property listings with the State of West Virginia Department of Tax and Revenue ("Tax Department") for Tax Years 2001, 2002, and 2003. During the course of litigation unrelated to this case, appellant discovered errors in the property listings filed with the Tax Department for those three tax years.

Appellant made an application for relief from erroneous assessment to the Kanawha County Commission on August 21, 2003. The letter set forth several errors in the industrial personal property listings filed by appellant for Tax Year 2001, 2002, and 2003. These errors are

(1) Appellant, in the normal course of business, generated inventory reports at the end of each calendar month. For Tax Years 2002 and 2003, appellant used reports generated on July 31 of Tax Years 2002 and 2003 and not reports showing inventory present on the assessment date of July 1 of Tax Years 2002 and 2003 or reports showing inventory on hand as of June 30 of Tax Years 2002 and 2003.

(2) Appellant inadvertently and erroneously claimed a "Freeport" exemption on certain goods used as raw materials at appellant's Kanawha County facilities.

(3) Appellant claims that they erroneously included materials in transit in Kanawha County which were not located in Kanawha County on the assessment date.

(4) Appellant claims the Tax Department failed to include $73,982 in inventory for a plant located in Institute, Kanawha County, for the three tax years in question. Appellant also claims that the error was that of the Tax Department.

Appellant requested a tax reduction in the total amount of $456,747 for Tax Years 2001, 2002, and 2003. Commission Hearing Tr. at p. 5.

A hearing was set for the appellant's application for relief from erroneous assessment, also known as an exoneration hearing, on November 6, 2003, and November 20, 2003. There is no evidence in the record that the Prosecuting Attorney of Kanawha County

("appellee") ever received notice of either hearing as required by W. Va. Code §11-3-27.

Appellant, at the hearing, admitted that an act of negligence bars appellant from receiving any relief. Commission Hearing Tr. at p. 36-37. Likewise, appellant admits the relief would be barred if the errors could reasonably have been discovered or reasonably should have been discovered by the appellant. Commission Hearing Tr. at p. 24-27. Appellant further admits that,

> "In order to even ask for what [appellant] is asking for tonight, the way I read the statute, this has to be an unintentional or inadvertent act."

Commission Hearing Tr. at p. 33; Statement by Commissioner Hardy agreed to by appellant's counsel.

Appellant provided evidence that the Tax Year 2001 industrial personal property listings were done by Price Waterhouse, a national accounting firm, and the Tax Year 2002 and 2003 returns were prepared by appellant's state tax group. Commission Hearing Tr. at p. 145-46.

With respect to Tax Year 2001, the accounting firm, Price Waterhouse, prepared the listing of industrial personal property and signed the same. Appellant did not review the statement before filing the same with the Tax Department. As appellant's state tax group manager testified before the County Commission,

> "It's a good idea for the taxpayer to review the return before it's filed."

Commission Hearing Tr. at p. 128. Additionally, appellant's tax manager was "very concerned" over Price Waterhouse's quality of work in October, 2000. Commission Hearing Tr. at p. 128, 131, 148. Appellant could not validate that the Price Waterhouse return for the 2001 Tax Year was correct. Commission Hearing Tr. at p. 129. However, appellant conceded that Price Waterhouse used the appellant's own data. Commission Hearing Tr. at p. 107.

Appellant either could not or did not review Price Waterhouse's work papers during the four months before the Tax Year 2001 meeting of the Kanawha County Commission as the Board of Review and Equalization. Indeed, nobody reviewed the appellant's industrial personal property listing for Tax Year 2001 before the listing was sent in, although several persons did have the opportunity for review. Commission Hearing Tr. at p. 125-26. Appellant stated that they were "busy" at the time. Commission Hearing Tr. at p. 103.

Appellant had the opportunity to audit Price Waterhouse's work. Commission Hearing Tr. at p. 108. The auditing of the return would not have been difficult:

> "I don't think there was anything special about [appellant's counsel Steven Broadwater's] being able to do it. It's just I had the occasion to look for it."

Commission Hearing Tr. at p. 124. Broadwater stated he had no special expertise in accounting. Commission Hearing Tr. at p. 124. Further, the state tax group chief stated,

> "Sir, I did not have a concern that it was incorrect. I just could not validate that it was correct."

Commission Hearing Tr. at p. 129.

With respect to the Tax Year 2002 and 2003 returns, appellant used the wrong monthly reports. Order at 12. The documents used for the industrial personal property listings were clearly dated July 31. Commission Hearing Tr. at p. 188. The personnel who sent the listings to the appellant's state tax group were the same as those who would have sent listings to Lyondell's accountants since none were terminated. Commission Hearing Tr. at p. 186.

At the time of the acquisition of the Lyondell plants in Kanawha County, appellant was engaged in acquisitions and business restructuring in the United States. Commission Hearing Tr. at p. 103. Appellant had several tax complications relating to its unfamiliarity with the business operations in Kanawha County. Commission Hearing Tr. at p. 100. The chief of the state tax group stated that the complications were appellant's fault. Commission Hearing Tr. at p. 152. The chief further stated that there were differences in the accounting records maintained at the individual plants and the corporate records from which industrial personal property statements were prepared for the tax years in question. Commission Hearing Tr. at p. 106. Appellant used records to prepare industrial personal property statements which did not actually reflect the inventories at the Kanawha County plants.

Commission Hearing Tr. at p. 106. Appellant did not suffer from a lack of knowledge of West Virginia's tax laws but suffered from, "a general lack of knowledge about what [appellant] was acquiring and what [appellant] owned." Commission Hearing Tr. at p. 121. Appellant also admitted that the state tax group, "didn't grasp exactly how they kept their records or what they were doing down in South Charleston or down in West Virginia." Commission Hearing Tr. at p. 118.

Glen W. Craney, Jr., was the site manager for appellant's facilities in Kanawha County. Commission Hearing Tr. at p. 171. Craney managed the Lyondell facilities prior to their acquisition by appellant in 2000. Commission Hearing Tr. at p. 171. Appellant's and Lyondell's accounting and reporting systems were allegedly not compatible. Commission Hearing Tr. at p. 175-76. Appellant's accounting personnel in Kanawha County were not reduced from the Lyondell's former staff, although a new accounting supervisor was brought in. Commission Hearing Tr. at p. 185-86. However, the accounting systems' incompatibility was addressed by Craney as,

> "A simple matter of whether you call something a raw material versus a product in your system, it is treated different ways in the accounting system."

Commission Hearing Tr. at p. 176.

The net effect of the testimony of the appellant's witnesses before the Kanawha County Commission was that the appellant,

> "[Appellant] went out and bought companies all over the place and [appellant] was real busy and [appellant] didn't have time to know what [appellant] was doing."

Commission Hearing Tr. at p. 114. There was "considerable confusion" in the transition from Lyondell to the appellant. Commission Hearing Tr. at p. 191.

The Kanawha County Commission voted to grant appellant's application for relief from erroneous assessment by a two-to-one vote. The appellee, within thirty days, filed a petition for writ of certiorari in the Circuit Court of Kanawha County, West Virginia. The Circuit Court, the Honorable Jennifer Bailey Walker presiding, reversed the decision of the Kanawha County Commission.

ISSUES PRESENTED

A. WHETHER OR NOT THE INACCURACIES IN THE APPELLANT'S TAX YEAR 2001, 2002, AND 2003 INDUSTRIAL PERSONAL PROPERTY LISTS RESULTED FROM CLERICAL ERROR OR A MISTAKE OCCASIONED BY UNINTENTIONAL OR INADVERTENT ACT AS DISTINGUISHED FROM A MISTAKE GROWING OUT OF NEGLIGENCE OR THE EXERCISE OF POOR JUDGMENT AND WHETHER THE APPELLANT'S APPLICATIONS FOR RELIEF FROM ERRONEOUS ASSESSMENT WERE TIMELY FILED.

B. WHAT IS THE BURDEN OF PROOF A TAXPAYER MUST SATISFY TO ESTABLISH A COUNTY COMMISSION'S AUTHORITY TO GRANT RELIEF FROM AN ERRONEOUS ASSESSMENT.

C. WHETHER OR NOT THE PROSECUTING ATTORNEY OF KANAWHA COUNTY HAS THE AUTHORITY TO APPEAL TO THE CIRCUIT COURT THE DECISION BY A COUNTY COMMISSION GRANTING RELIEF FROM ERRONEOUS ASSESSMENT.

D. WHETHER OR NOT DE NOVO REVIEW OF BOTH THE FACTS AND THE LAW IS THE PROPER STANDARD OF REVIEW TO BE USED BY THE CIRCUIT COURT IN REVIEWING AN APPLICATION FOR RELIEF FROM ERRONEOUS ASSESSMENT.

ARGUMENT

A. THE INACCURACIES IN APPELLANT'S TAX YEAR 2001, 2002, AND 2003 INDUSTRIAL PERSONAL PROPERTY LISTS RESULTED FROM NEGLIGENCE AND/OR POOR JUDGMENT AND THE APPLICATIONS FOR RELIEF FROM ERRONEOUS ASSESSMENT WERE NOT TIMELY FILED WITHIN THE MEANING OF W. VA. CODE §11-3-27.

1. Introduction.

The consideration of an application for relief from erroneous assessment occurs after the meetings of the county commission sitting as a board of review and equalization during the month of February of each year. The process is governed by W. Va. Code §11-3-27. That provision, in pertinent part, reads,

> "(a) Any taxpayer, or the prosecuting attorney or tax commissioner, upon behalf of the state, county and districts, claiming to be aggrieved by any entry in the property books of the county, including entries with respect to classification and taxability of property, resulting from a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment, may, within one year from the time the property books are delivered to the sheriff or within one year from the time such clerical error or mistake is discovered or reasonably could have been discovered, apply for relief to the county commission of the county in which such books are made out * * *"

In other words, an applicant must show the following for the county commission to be able to have jurisdiction to hear the claim:

(1) that the entry in the tax books came from a clerical error or mistake as a result of an unintentional or inadvertent act,

rather than one arising from negligence or the exercise of poor judgment; and

(2) that the error was discovered (a) within one year of the time the clerical error or mistake was reasonably discovered, or (b) within one year of the time the clerical error could reasonably have been discovered; or (c) within one year of the time the property books were delivered to the sheriff, whichever occurs first.

The former gives a chance for correction from a clerical error, while the latter imposes a time limitation. The failure of proof results in a lack of jurisdiction on the part of a county commission to hear an application for relief from erroneous assessment.

This Court has considered what conduct constitutes a clerical error on several occasions. In all three, this Court has taught that the term "clerical mistake" means,

> "An error committed in the performance of clerical work, no matter by whom committed; more specifically, a mistake in copying or writing; a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination; an error made by a clerk in transcribing, or otherwise, which must be apparent on the face of the record, and capable of being corrected by reference to the record only."

Stephenson v. Ashburn, 137 W. Va. 141, 146 (1952), citing, 14 C.J.S. at p.1202; see also, Johnson v. Nedeff, 192 W. Va. 260, 265

(1994), and Barber v. Barber, 195 W. Va. 38, 42-43 (1995). Likewise, this Court has declared,

> "Negligence is conduct unaccompanied by that degree of consideration attributable to the man of ordinary prudence under like circumstances."

Syllabus Point #4, Patton v. City of Grafton, 116 W. Va. 411 (1935), cited in, Honacker v. Mahon, 210 W. Va. 53, 33 (2001).

2. The 2001 Incorrect Industrial Personal Property Listings Were the Result of Negligence and/or the Exercise of Poor Judgment.

The testimony presented by appellant during the hearing shows that the appellant is a sophisticated taxpayer and has substantial experience with the tax laws of the State of West Virginia. Commission Hearing Tr. at p.138. The chief of the appellant's state tax group, Mr. Gary Dzura, is a CPA. Commission Hearing Tr. at p.96-97.

Appellant outsourced the performance of the 2001 industrial personal property tax listing to an accounting firm, Price Waterhouse. Commission Hearing Tr. at p.145-46. The appellant's state tax group chief admitted that nobody at the appellant's firm, the appellant's state tax group, or Dzura thoroughly reviewed the 2001 personal property tax listing prepared by Price Waterhouse even though, as Dzura testified,

> "It's a good idea for the taxpayer to review the return before its filed."

Commission Hearing Tr. at p. 128. Appellant's state tax chief further testified that he was "very concerned" over the quality of

Price Waterhouse's quality of work in October, 2000. Commission Hearing Tr. at p. 128, 131, 148. Dzura not only conceded that Price Waterhouse used the appellant's data for the 2001 industrial personal property tax listing, Commission Hearing Tr. at p. 129, but also tellingly admitted,

> "Sir, I did not have a concern that it was incorrect. I just could not validate that it was correct."

Id. Finally, even appellant's counsel, who had no expertise in accounting found the errors because, "It's just I had the occasion to look for it." Commission Hearing Tr. at p. 124.

This Court has said,

> "Negligence is conduct unaccompanied by that degree of consideration attributable to the man of ordinary prudence under like circumstances."

Patton v. City of Grafton, supra. It is clear that the appellant, its state tax group, and its state tax group chief did not act prudently as others under similar circumstances with respect to the 2001 industrial personal property listing.

Appellant and its state tax group chief were "very concerned" about the work performed by Price Waterhouse in October 2000, right about the time for filing of industrial personal property tax listings with the Tax Department. However, nobody confirmed the accuracy of the information in the listing. Rather, the listing was sent through even though Dzura could not confirm the listing's

correctness. Such conduct is clearly negligent under Patton v. City of Grafton.

Additionally, the evidence was taken and heard without refute. The Circuit Court's decision was based upon that evidence. Because there was no contrary evidence presented, and because the evidence was taken at face value, the burden of proof, whether by preponderance or clear and convincing evidence, was unmet by the appellant based upon its own witnesses.

For this reason, the County Commission was without authority to grant relief under the appellant's application for relief from erroneous assessment.

3. The Application for Relief from Erroneous Assessment Was Untimely With Respect to the 2001 Tax Year.

W. Va. Code §11-3-19 declares that the assessor shall deliver the property books to the sheriff on June 7th of each year. Thus, for Tax Year 2001, the tax books were delivered to the sheriff by June 7, 2001, at the latest. Because the application for relief from erroneous assessment was not filed by June 7, 2002, the application is untimely under this provision. W. Va. Code §11-3-27.

The appellant seeks savings under the provisions of W. Va. Code §11-3-27 since the application for relief from erroneous assessment was made within one year of the date when the error was discovered or reasonably could have been discovered. Appellee believes the appellant fails under this ground as well.

A review of the record shows clearly and convincingly that the appellant knew or reasonably should have known that the errors in the industrial personal property tax listing for Tax Year 2001 existed at the time of filing. Again, we look to appellant's chief of its state tax group's testimony. Again, Mr. Dzura testified,

> "Sir, I did not have a concern that it was incorrect. I just could not validate that it was correct."

Commission Transcript at p. 129. Finally, even appellant's counsel, who had no expertise in accounting found the errors because, "It's just I had the occasion to look for it." Commission Hearing Tr. at p. 124.

It is obvious that the appellant could have easily uncovered the error by engaging in standard accounting practices by reviewing the industrial personal property tax listing. Appellant was in the best position to do so. Couple that with the positioning of the appellant's tax chief's awareness of problems with the quality of Price Waterhouse's work, the admission that the "good idea" is for a taxpayer to review a matter before filing, and the fact that the appellant's state tax group chief just couldn't validate the correctness of the listing and it shows that appellant and its tax staff were at least placed in inquiry notice that something was amiss with the listing. Cf., Jackson v. Wheeling Terminal Railway Co, 65 W. Va. 415, ___, 64 S.E. 2d 450, 451 (1909). Thus, in this case, it is very fair to say that the appellant's state tax group

just plowed ahead into a tunnel without regard for the source of existing smoke.

As a result, appellant reasonably could have discovered the errors within its own knowledge prior to the passage of one year by merely following up on the facts within its knowledge. Appellant, in an exercise of negligence and poor judgment, chose not to.

The burden of proof, whether by preponderance or clear and convincing evidence, is not determinative here. Because the evidence was received at face value and without refute, it is clear that the appellant failed to prove the errors could not have been uncovered prior to June 7, 2002, under either burden.

Therefore, the appellant's application for relief from erroneous assessment for 2001 was untimely. As a result, the County Commission was without authority to grant the appellant's application for relief from erroneous assessment.

4. The Incorrect 2002 and 2003 Industrial Personal Property Listings Were the Result of Negligence and/or the Exercise of Poor Judgment.

Appellant's state tax group prepared the 2002 and 2003 industrial personal property listings internally. Appellant admittedly has fifty years' experience in dealing with the West Virginia tax processes. However, appellant used monthly inventory reports dated July 31st of each year rather than inventory reports for June 30th. The dating of the reports must have been plainly

obvious since the error was uncovered by counsel for appellant, a person with no accounting experience.

Appellant had an opportunity to review the reports and the data on them prior to filing the 2002 and 2003 industrial personal property listings. Appellant, with fifty years' experience in dealing with West Virginia tax law, should have immediately noted the obvious date error. However, appellant did not. Apparently, too, there was no internal review of the listing before filing.

The conduct of filing the industrial personal property tax listing without double-checking the relevant date from which the listing is made is clearly not the conduct of an ordinary prudent man under the circumstances, much less the proper conduct of a sophisticated taxpayer such as the appellant. A sophisticated businessman must use greater diligence in his business operations. Cf., Berardi v. Meadowbrook Mall Co., 212 W. Va. 377 (2002). Nor does the claim of busy-ness of the defendant provide relief. A person engaged in intricate business with more records has a greater duty of making sure that his tax filings are correct. Phillips Petroleum Co. v. Curtis, 85 F. Supp. 399, 401 (D. Okla. 1949).

Therefore, inaccuracies of the appellant's 2002 and 2003 industrial personal property listings were caused by the appellant's negligence and poor judgment. Because the inaccuracies in the appellant's 2002 and 2003 industrial personal property

listings were the result of the appellant's negligence and poor judgment, the County Commission was without authority to hear the issue.

The burden of proof once again does not impair the finding of the Circuit Court. Whether the burden is by a preponderance or clear and convincing evidence, the Circuit Court's decision was based solely upon the appellant's evidence accepted at face value. Because the appellant failed to meet even the lower burden of proof, the County Commission was without authority to hear the appellant's application for relief from erroneous assessment.

5. The Application for Relief from Erroneous Assessment Was Untimely With Respect to the 2002 Tax Year.

W. Va. Code §11-3-19 declares that the assessor shall deliver the property books to the sheriff on June 7th of each year. Thus, for Tax Year 2002, the tax books were delivered to the sheriff by June 7, 2002, at the latest. Because the application for relief from erroneous assessment was not filed by June 7, 2003, the application is untimely under this provision. W. Va. Code §11-3-27.

The appellant could have avoided the entire issue of an application for relief from erroneous assessment by double-checking the 2002 industrial personal property listing. The error was uncovered by counsel for the appellant who admittedly has no expertise in accounting. It seems obvious to the appellee that a mere check or review of the return could have resulted in

corrections and the ultimately the filing of an accurate return. The appellant chose not to do so.

The imprudent conduct of the appellant clearly shows that the appellant, by mere internal review, could reasonably have uncovered the errors prior to the passage of June 7, 2003. As a result, the appellant's application for Tax Year 2002 was untimely.

The burden of proof once again does not impair the finding of the Circuit Court. Whether the burden is by a preponderance or clear and convincing evidence, the Circuit Court's decision was based solely upon the appellant's evidence accepted at face value. Because the appellant failed to meet even the lower burden of proof, the County Commission was without authority to hear the appellant's application for relief from erroneous assessment.

B. A TAXPAYER MUST PROVE JURISDICTIONAL FACTS REQUIRED BY W. VA. CODE §11-3-27 BY CLEAR AND CONVINCING EVIDENCE TO GIVE THE COUNTY COMMISSION AUTHORITY TO GRANT RELIEF FROM AN ERRONEOUS ASSESSMENT.

The Circuit Court of Kanawha County, in reversing the decision of the Kanawha County Commission, declared that the appellant Bayer Corporation was required to prove the jurisdictional facts to the County Commission by a preponderance of the evidence. The Circuit Court rejected the assertion that the required burden of proof was by clear and convincing evidence. Order at p. 12. The appellee Prosecuting Attorney disagrees.

Assessments by assessing officers are presumed to be correct and the burden of showing assessment to be erroneous is on the

taxpayer. Western Pocahontas Properties, Ltd., v. County Commission of Wetzel County, 189 W. Va. 322 (1993). That burden of proof is by clear and convincing evidence. Id. at 324-25, citing, Tug Valley Recovery Center, Inc. v. Mingo County Commission, 164 W. Va. 94 (1979). Thus, it seems logical that the burden of proving authority to challenge assessments should be by the same burden of proof.

Because tax revenues are essential to providing and maintaining necessary public services, cf., Bluestone Paving, Inc. v. Tax Commissioner, 214 W. Va. 684, 695 (2003), Maynard, J., concurring), alterations to taxes assessed, collected and relied upon by those public bodies should not be withdrawn based upon less than substantial evidence. Rather, a higher than usual standard of proof must be imposed because of the need for integrity in the budge process. See, G.M. McCrossin, Inc. v. West Virginia Board of Regents, 177 W. Va. 539, 543 (1987). That higher standard of proof is by clear and convincing evidence.

The risks of reduced funding in later years because of mistakes — whether caused by the taxpayer or the government — may cause government to reduce or even eliminate essential services. The reduction of the numbers of prosecutors or deputy sheriff's does not enhance public safety, nor does the reduction in force of the number of ambulances available by the Kanawha County Emergency

Medical Services increase the public health. Likewise, no taxpayer likes to pay more in taxes than required.

Another reason for the imposition of a higher burden of proof in an application for relief from erroneous assessment is that the application phase only comes after the taxpayer has had the opportunity to appear before the Board of Review and Equalization, pursuant to w. Va. Code §11-3-24. The equalization and review occurs in February of each calendar year and before the County Commission and the various levying bodies set levy rates and finalize budgets in reliance upon property assessment valuations in the following months. See, e.g., W. Va. Code §11-8-9. Therefore, it is only sensible that a taxpayer who comes in subsequent to the meeting of the Board of Review and Equalization in February and the levying bodies rate-setting meetings in March bear the more stringent burden of proof of clear and convincing evidence when presenting an application for relief from erroneous assessment.

This Court can walk that thin line between forcing reduced services by retroactive tax reductions and satisfying the taxpayer's goal of not paying more taxes than necessary by requiring the higher burden of proof of clear and convincing evidence when seeking post-budgeting corrections of erroneous assessments.

C. THE PROSECUTING ATTORNEY HAS THE AUTHORITY TO APPEAL A TO THE CIRCUIT COURT A DECISION BY A COUNTY COMMISSION REGARDING A GRANT OF RELIEF FROM ERRONEOUS ASSESSMENT, PARTICULARLY WHERE THE PROSECUTING ATTORNEY HAS NOT RECEIVED NOTICE OF THE RELIEF HEARING AS REQUIRED BY W. VA. CODE §11-3-27.

The appellee Prosecuting Attorney of Kanawha County, West Virginia is a real party in interest in this proceeding by direct action of the Legislature. The explicit provision of W. Va. Code §11-3-27(a) declares without equivocation,

> "* * * Before the application is heard, the taxpayer shall give notice to the prosecuting attorney of the county, or the state shall give notice to the taxpayer, as the case may be. * * *"

The record in before this Court, as in the Circuit Court, shows no evidence of notice to the prosecuting attorney. This Court cannot presume a fact where the record regarding that fact is silent. See, State ex. rel. Johnson v. Zakaib, 184 W. Va. 346 (1990).

The appellant had the burden of giving the appellee notice of the hearings with respect to appellant's hearing on the application for relief from erroneous assessment. The record does not clearly show that the notice was given. Thus, notice cannot be presumed for any hearings before the County Commission.

The appellant makes some claim that the appellee is substituting its judgment for that of the State Tax Department by virtue of the captioning of the action as "State ex rel. . . ." Because the action is taken as an extraordinary remedy in

certiorari, it is proper to name the case in the "State ex rel." format. Cf., State v. Matthews, 44 W. Va. 372 (1898).

The appellant spends time discussing the decision of this Court in Keesecker v. Bird, 200 W. Va. 667 (1997), and the provisions of Rule 17 of the West Virginia Rules of Civil Procedure. In this whole argument the appellant seeks to have this Court read out the required notice to the prosecutor under W. Va. Code §11-3-27 by saying that only the State Tax Department may settle a claim of erroneous assessment relating to the assessment of industrial personal property. Such a conclusion is clearly contrary to the language of W. Va. Code §11-3-27.

The relevant language of W. Va. Code §11-3-27 reads,

> "(a) Any taxpayer, or the prosecuting attorney or tax commissioner, upon behalf of the state, county and districts, claiming to be aggrieved by any entry in the property tax books of the county * * * may, * * * apply for relief to the county commission . . ."

That provision, coupled with the requirement of notice to the prosecuting, permits the prosecuting attorney as an independent party to object to the granting of any application for relief from erroneous assessment and require hearing notwithstanding the consent of the assessor or tax commissioner. Thus, the prosecuting attorney is a real party of interest who does, "have the power to make final and binding decisions concerning the prosecution, compromise, and settlement of a claim." See, part, Syllabus Point

5, Keesecker v. Bird, supra. Therefore, the appellee is a real party in interest.

The true interest arose in this case when it appears that the Tax Department did not adequately prepare or represent Kanawha county and it's levying bodies in the hearing on the appellant's application for relief from erroneous assessment. Notice to and the participation of the county prosecutor is necessary to protect the interests of all levying bodies to prevent the terrible impact of a state "roll over" in hearings on applications for relief from erroneous assessment on industrial property. The appellant, by failing to provide the required notice, precluded adequate representation of the county government and its levying bodies before the County Commission. Again, therefore, the appellee is a real party in interest.

The appellant further seeks to invoke the doctrine of separation of powers within the meaning of article V, §1 of the West Virginia Constitution and the language of this Court's decision in State ex rel. McGraw v. Burton, 212 W. Va. 23 (2002). Because there is no doctrine of separation of powers at levels of government below the state level, see, Butler v. Tucker, 187 W. Va. 145, 151 (1992), the County Commission and the Prosecuting Attorney

cannot be said to be members of any of the three branches of government as applicable to this case.[1]

The appellee has confidence that this Court will not find that the appellee had no remedy. First, there is no remedy before the County Commission pursuant to W. Va. Code §11-3-27 for rehearing. The appellee does recognize that W. Va. Code §11-3-25 does grant the right of certiorari review to a person who has appeared before the County Commission to contest an assessment. However, where the nonappearance of a statutorily-required party is as a result of failure of notice, as the record here clearly shows, then permitting an extraordinary petition for review under certiorari is the only real remedy. Otherwise, taxpayers and others will be permitted to gain unacceptable results in proceedings, whether by

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[1]This Court has previously declared that a prosecuting attorney is a member of the executive branch in the context of the criminal process. State ex rel. Games-Neeley v. Sanders, 220 W. Va. 230, 238-39 (2006), citing, State ex rel. Ginsberg v. Naum, 173 W. Va. 510 (1984), State ex rel. Hempstead v. Dostert, 173 W. Va. 133 (1984), and Syllabus Point #7, State ex rel. Skinner v. Dostert, 166 W. Va. 743 (1981). It seems to the appellee that if the appellee were truly a member of the executive branch, the appellant's separation of powers claim fails immediately since the executive branch cannot unconstitutionally usurp the power of the executive branch.

Additionally, the executive branch frequently acts against the executive branch. For example, the West Virginia Department of Environmental Protection just recently fined the West Virginia Division of Highways $125,000 for repeated environmental law violations during the construction of the Route 35 project in Putnam County. See, Ward, Ken, Charleston Gazette, March 24, 2008, "DOH Cited for Water Pollution."

accident or by deceit. Such outcomes should be deemed by this Court to be unacceptable.

D. A DE NOVO REVIEW OF THE FACTS AND THE LAW IS THE PROPER STANDARD OF REVIEW REGARDING AN APPLICATION FOR RELIEF FROM ERRONEOUS ASSESSMENT PURSUANT TO W. VA. CODE §§11-3-25 AND 53-3-3.

The Circuit Court of Kanawha County reviewed the decision of the County Commission using the de novo standard of review. That standard is clearly set forth within the provisions of W. Va. Code §53-3-3 which, in pertinent part, reads,

> "* * * Upon the hearing, such circuit court shall, in addition to determining such questions as might have been determined upon a certiorari as the law heretofore was, review such judgment, order or proceeding, of the county court, council, justice or other inferior tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require. * * *"

The statute authorizes a de novo review of certiorari cases by the circuit court from an inferior tribunal. This Court has so recognized in Harrison v. Ginsberg, 169 W. Va. 162 (1982). This Court noted that the scope of the writ had been broadened, 169 W. Va. at 172, that the scope of review was expanded, id., gave the courts power to rehear the issues certified from the inferior tribunal, id. at 172-73, and found the role of the court to be that of a fact-finding tribunal. Id. at 174. Finally, this Court said,

> "Moreover, we recently held in Golden v. Board of Education of Harrison County (citation omitted), a case involving review by the

> circuit court on certiorari of a county board of education administrative ruling, that '[w]hen the circuit court sits in review of the decisions of . . . Administrative tribunals it shall record findings of fact and conclusions of law along with the judicial orders which it issues. * * * It is obvious that the circuit court could not comply with this requirement without making its own independent review of the law and facts pertinent to the case."

Id. at 175.

While the appellant desired the circuit court to defer to the judgment of the County Commission, the circuit court did not have such an obligation. The issues presented the circuit court were issues of negligence, mistake, clerical error, and unintentional or inadvertent act. Such are not outside the function of the Court and, therefore, deference is not required. See, Christie v. Elkins Area Medical Center, Inc., 179 W. Va. 247 (1988)(no requirement to defer to an agency when no special expertise required).

The Circuit Court received the testimony before the County Commission as being true. The issues in the matter were not issues which required deference to the special knowledge of a speciality agency. The Circuit Court applied the facts as set forth in the record, reviewed existing decisional law, and ultimately came to a different conclusion than the majority of the County Commission. Such is proper within a de novo review standard pursuant to W. Va. Code §53-3-3.

REQUEST FOR RELIEF

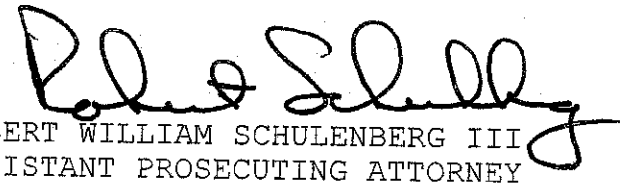
The appellant was not entitled to relief from errors made in the Tax Year 2001, 2002, and 2003 industrial personal property listings since those errors were the result of negligence and the exercise of poor judgment by the appellant and its employees. The application for relief from erroneous assessment filed on August 31, 2003, was untimely with respect to the Tax Year 2001 and 2002 industrial personal property tax listings. Additionally, the appellant failed to prove even by a preponderance of the evidence in presenting evidence regarding the application for relief from erroneous assessment for Tax Years 2001, 2002, and 2003. Therefore, the County Commission of Kanawha County was without authority to grant the appellant any relief from those errors.

The appellee additional asks this Court to find that the burden of proof regarding jurisdictional facts relating to applications for relief from erroneous assessment to be proof by clear and convincing evidence.

The appellee additionally asks that this Court find that the decision of the Circuit Court of Kanawha County, West Virginia, in applying the de novo standard of review of the law and the facts in the case of certiorari regarding grants of applications for relief from erroneous assessment to be the proper standard of review.

The appellee finally asks that this Court affirm the decision of the Circuit Court of Kanawha County in this action.

STEPHEN B. REVERCOMB,
PROSECUTING ATTORNEY,
APPELLEE,

By: 

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NO. 33871

STATE OF WEST VIRGINIA ex rel.
PROSECUTING ATTORNEY OF KANAWHA
COUNTY, WEST VIRGINIA,

Petitioner Below,
Appellee Here,

v.

BAYER CORPORATION,

Respondent Below,
Appellant Here

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following parties by First Class United States Mail, postage prepaid by me, on the 30th day of April, 2008, an addressed as follows:

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